EXHIBIT A

TRANSACTION PROCESSING NETWORK

MASTER SERVICES AGREEMENT

BETWEEN

VITAL PROCESSING SERVICES, LLC

AND

TRANSACTION NETWORK SERVICES, INC.

DATED Oct 29, 2002

VITAL/TNS CONFIDENTIAL
FINAL
OCTOBER 24, 2002

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SUPPLIER NOR VITAL MAKES ANY OTHER WARRANTY OR GUARANTEE, EXPRESS OR IMPLIED, UNDER THIS AGREEMENT, AND EACH PARTY EXPRESSLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

26. *ADDITIONAL OBLIGATIONS*

26.1 Space Licenses and Co-location

During the Term, subject to space availability and its ability to do so under its agreements with Supplier Agents or other third parties, Supplier shall allow Vital Group Companies to locate Vital Equipment at Supplier's premises (including PoPs or nodes) as is reasonably required for the efficient and cost effective provision of the Services.

26.2 Notification of Pending or Threatened Non-Performance

If, for any reason, Supplier discovers that it or any Supplier Agent shall not be able to provide the Services hereunder, Supplier shall promptly notify Vital of that fact. The notification shall be written and shall include a detailed description of the problem, the causes of the problem and Supplier's or Supplier Agent's contingency plan(s). Such notification shall not relieve Supplier of its obligations and shall not preclude any remedies available to Vital hereunder.

26.3 Third-Party Warranties

Supplier shall (to the extent legally and contractually permissible) pass-through to Vital or enforce for Vital's benefit any material rights, warranties, licenses, and other benefits accruing to Supplier under Supplier's agreement with the third party participating in or providing Equipment or Software used in the provision of Services.

26.4 Regulatory Reports

Supplier shall use reasonable efforts to notify Vital promptly in writing of all legal and regulatory developments that have a reasonable likelihood of materially affecting the price, terms, or conditions under which Supplier or Supplier Agents provide the Services or Supplier's ability to provide them in accordance with this Agreement.

26.5 Non-Interference

(a) Supplier shall install, maintain, and provision the Services:

(i) in conformity with reasonable precautions common in the industry designed to promote safety, avoid accidents and prevent injury to person or property at the Sites;

(ii) in such a manner as will not, except to the extent consented to in writing by Vital in advance,

(A) create any hazardous condition or interfere with or impair in any material respect the operation of the heating, ventilation, air conditioning, plumbing, electrical, fire protection, safety, security, public utilities or other systems or facilities at any Site, or

(B) interfere with the use or occupancy of common areas at any Site or the premises of any tenant occupying any space therein; and

(iii) in such a manner as will minimize, to the extent commercially reasonable, the disruption to Vital's normal business operations that might arise as a result of such activities.

(b) Supplier shall not at any time do or perform any act, omit to do or perform any act, or permit any Supplier Agent to do or perform any act, that Supplier knows or reasonably should know will place Vital in default under the terms of any insurance policy, mortgage, lease or rules governing activity at any Site. Supplier shall, at its own expense, immediately correct or remedy any such act or omission upon receipt of notice thereof from Vital. If, upon receipt of notice, Supplier fails to promptly correct or remedy any such act or omission promptly, and such failure results in a default by Vital under the terms of any such insurance policy, mortgage, lease, or rules governing activity, Supplier will indemnify and hold harmless Vital from any Damages.

27. *CONTROL OF TELEPHONE NUMBERS, CIRCUITS, AND BIN TABLES*

27.1 Vital's Rights and Supplier's Obligations.

(a) Vital shall have sole control, the sole right to use and assign and (to the extent permitted by law) sole ownership of all telephone numbers assigned to it or any Vital Group Company by local exchange carriers, interexchange carriers, or others that receive Vital traffic or carry such traffic to Supplier Network access points. These rights shall extend to all toll-free telephone numbers, and Feature Group B telephone numbers used to deliver the Services. To the extent that any telephone number Vital uses in connection with the Services is assigned to, or controlled by, any Supplier Group Company, Supplier shall, within thirty (30) days of (i) the Commencement Date, (ii) initiation of any Transaction Processing Network Service using such number, (iii) acquisition of Supplier by a Vital competitor, or (iv) acquisition by Supplier of

another entity/business providing services similar to the Services to a Vital Group Company, whichever applies, assign or transfer, or cause others to assign or transfer, such number to Vital, and take all steps necessary to consummate such assignment.

(b) Supplier warrants that it will not use Shared Numbers in the provision of the Services to Vital or the Vital Group Companies.

(c) Vital's rights under this Section 27.1 shall include the exclusive and unlimited right to use, choose not to use, allow any Vital Group Company to use, and prevent others from using, any or all of the telephone numbers described in this section with the Services provided by Supplier in accordance with this Agreement, and/or with services provided by Vital or other service providers for any purpose, and to assign any or all of such telephone numbers to any third party or to access points on any other data communications network Vital may select. No Supplier Group Company nor any agent, representative, subcontractor, or other entity with which any Supplier Group Company has, has had, or may have a business relationship of any kind, shall interfere with, impair, or object to, or attempt to interfere with, impair, or object to, Vital's assertion or exercise of its rights as described in this section, either directly, indirectly, or through a third party.

(d) Supplier's breach of any of its obligations under this Article 27 shall constitute a material breach of this Agreement within the meaning of Section 31.1. Vital's rights, and Supplier's obligations, under this Article 27 shall survive termination or expiration of this Agreement.

27.2 Conversion of Terminals

In the event of termination or expiration of this Agreement, partial discontinuance of any Service, or the acquisition of Supplier by a Vital competitor, Supplier agrees, with respect to the telephone numbers and leased line circuits described in Section 27.1(a), above, that Supplier will cooperate in good faith during the Migration Period to enable Vital to convert terminals using such numbers to any data communications network(s) Vital selects, as expeditiously, and at the least cost, possible under the circumstances.

27.3 Unavoidable Changes

Supplier shall have the right to change any telephone number that is assigned to a Supplier Network access point but that Vital does not control or have the right to control pursuant to Section 27.1(a).

27.4 Vital BIN Tables

Vital shall have and maintain sole ownership of, and sole control over the use of, the numbers used in Vital BIN tables that Supplier uses to route Vital traffic. Vital shall have the right to select and direct Supplier to change those routing numbers. In no event, either during the Term of this Agreement or following its expiration or termination, shall Supplier use the Vital BIN tables or associated numbers described in this Section for routing transactions or other traffic to any party other than Vital without Vital's prior consent, which may be granted or withheld in its sole discretion.

27.5 Precedence of this Article 27

In the event that any provision of this Article 27 and any other provision of this Agreement cannot reasonably be interpreted consistently, the provision of this Article 27 shall prevail, except where an Attachment or Service Schedule provides Vital with greater rights, or provides Supplier with increased obligations, than are provided under this Article 27.

28. *INDEMNITIES*

28.1 Mutual Indemnity

Each Party (the "Indemnifying Party") shall indemnify, defend, and hold the other Party and its Affiliates (the "Indemnified Party") harmless against all Damages resulting from claims or actions brought by third parties against the Indemnified Party in connection with (a) injury to or death of any person and (b) loss of or damage to real or tangible personal property or the environment to the extent that such Damages were proximately caused by any gross negligence or willful misconduct by the Indemnifying Party, its agents, employees, contractors, subcontractors, suppliers, materialmen, laborers, or agents in connection with the provision or use of Services

28.2 Indemnification for Illegal, Unlawful, or Willful or Grossly Negligent Use, Abuse, or Provision of the Services

(a) If any Vital Group Company makes any illegal or unlawful use of the Services, or willfully or in a grossly negligent manner misuses or abuses any Service provided by Supplier in a manner that is inconsistent with the Documentation, then Vital, at its own cost and expense, shall defend, indemnify and hold harmless Supplier from and against Damages arising from third party claims to the extent that any such Damages were the

IN WITNESS WHEREOF, each of which of Vital and Supplier has caused this Agreement to be signed and delivered by its duly authorized representative on Oct 29, 2002.

VITAL PROCESSING SERVICES, LLC

By: H E Hesselmann
Name: HARRY E HESSELMANN
Title: EVP

TRANSACTION NETWORK SERVICES, INC.

By: Larry Thompson
Name: Larry Thompson
Title: Senior Vice President

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EXHIBIT B

DECLARATION OF TIMM MARSHALL

In 2005 I was a software engineer for Electronic Payment Systems, LLC (EPS). Part of my duties included writing the necessary programs and making the necessary changes to EPS' computer systems to facilitate the conversion of EPS' merchants from processing with CardSystems, to processing with TSYS Acquiring Solutions, LLC. ("TSYS").

A team of individuals from TSYS headed by Mick Tucillo came to EPS and worked with a team from EPS on certification of the terminals EPS used. As part of that effort the TSYS team helped EPS configure the Nurit Control Center (NCC) to enable the merchants terminals to process through TSYS, in place of CardSystems. One of the steps in setting up the NCC was to input the toll free numbers that would be loaded into terminals to enable them to process transactions with TSYS. This was part of changing the host file so the terminals would contact TSYS rather than CardSystems, when processing a credit or debit card transaction. TSYS provided the toll free numbers to EPS that were put into the host file. I believe there were two numbers, a primary and a back up that were put into the host file. This was all part of building the software to convert to TSYS.

The TSYS and EPS representatives configured the host file once, using the numbers provided by TSYS and then once this was done the numbers in the host file were left alone. TSYS then proceeded to convert EPS' merchants from the CardSystems platform to the TSYS platform by installing the host file, including the numbers from TSYS, into EPS' merchants' terminals. Since the TSYS team converted (sometimes referred to as "rolled over") the EPS merchants using this process and the host file with the numbers provided by TSYS, I believe the lion's share of the merchant terminals should have just the primary number and the back up number TSYS originally provided.

After the conversion by TSYS, when new merchants were put on by EPS staff after the conversion, they would also simply download the host file into the merchant's terminal, and that would include the same numbers because they were already in the host file. EPS does not "select" the numbers each time it boards a new merchant. It simply loads the host file into the merchant's terminal. The host file already has the numbers in it.

I believe EPS, as well as TSYS, has the capability to go into the system and change the toll free numbers, but EPS would have no reason to do so, unless TSYS told EPS to. Any numbers in addition to the primary number and the back up number originally provided by TSYS as part of the conversion, would had to have been provided by TSYS - otherwise the numbers would not connect with TSYS to process a transaction. I am not aware of anyone at EPS ever "selecting" or changing the toll free number that is downloaded into a merchant's terminal.

No one from TSYS ever discussed with me whether there were more than the 2 numbers that TSYS input into the host file. Nor did anyone from TSYS ever tell me, or to my knowledge anyone at EPS, that the numbers TSYS provided were not unique to EPS' merchants - as that would have been contrary to the discussions I participated in.

I declare under penalty of perjury the foregoing is true and correct.

EXECUTED on this 25th day of April, 2011.

Timm Marshall

EXHIBIT C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC, Plaintiff, vs. Electronic Payment Systems, LLC, Defendant.	No. CV-09-00155-PHX-JAT **ORDER**

Pending before the Court are the following motions: (1) Defendant Electronic Payment Systems, LLC's Motion to Compel Plaintiff's Compliance with Court's Judgment and/or for Finding of Contempt and Imposition of Sanctions (Doc. # 63); (2) Plaintiff TSYS Acquiring Solutions, LLC's Motion to Stay Proceedings to Enforce Judgment (Doc. # 84); and (3) Defendant Electronic Payment Systems, LLC's Supplemental Motion to Compel (Doc. # 85). The Court conducted a hearing on January 25, 2011, and now rules on the motions.

On January 20, 2009, an arbitrator ordered TSYS Acquiring Solutions ("TSYS") to provide Electronic Payment Systems ("EPS") with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS's merchants to a processor. (Doc. # 1-2, Ex. B at p. 39.) Over two years later, TSYS continues to strenuously refuse to comply with that order, despite numerous rulings and orders in favor of EPS. Yet

again, TSYS raises vexing issues concerning compliance with the arbitrator's award. However, none of these issues are properly before the Court, which has been called upon to enforce the arbitrator's award. On the eve of the hearing, TSYS filed yet another document with the Court seeking to avoid compliance with the arbitrator's award. Even though the Court informed the parties that TSYS's Supplement to Its Motion to Stay Proceedings to Enforce Judgment (Doc. # 98), filed January 24, 2011, would not be considered by the Court during the January 25, 2011 hearing, TSYS disregarded the Court and repeatedly referred to the supplement during oral argument. The Court will not consider references to the supplement, and hereby strikes the unauthorized supplement from the record.

I. PROCEDURAL AND FACTUAL BACKGROUND

TSYS and EPS are involved in the credit/debit card industry. The parties entered into an agreement in August 2005, which provided that EPS would use the processing services of TSYS. The parties' agreement contained an arbitration clause requiring the arbitration of disputes arising out of the agreement. As part of the agreement, TSYS agreed to install an exclusive 1-800 number on the point-of-sale terminals of EPS's merchant customers. EPS sought the exclusive number because it would permit EPS to move its merchant portfolio to another payment processing vendor if problems arose with TSYS. TSYS did not provide EPS with an exclusive 1-800 number, but rather "boarded" EPS merchants on seven 1-800 numbers also used by hundreds of thousands of non-EPS merchants.

In February 2007, TSYS initiated arbitration to resolve the parties' various disputes. TSYS asserted that it was entitled to be paid all of the disputed billing amounts held by EPS. EPS asserted various counterclaims, and sought to recover the exclusive 1-800 number TSYS promised to provide to EPS. In September 2008, an arbitration hearing was held at the offices of the American Arbitration Association. The arbitrator ruled that EPS did not have to pay the amounts it disputed, and ruled in favor of EPS on each of EPS's counterclaims. The arbitrator awarded EPS damages in excess of $2,991,000.00, and ordered "TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS'[s] merchants to a processor." (Doc. # 1-2, Ex. B at pp.

38–39.)

On January 26, 2009, TSYS filed the present action ("*TSYS I*"), seeking to vacate the arbitration award *in toto*. On October 22, 2009, the Court entered summary judgment in favor of EPS (Doc. # 33), and on May 4, 2010, the Court confirmed the arbitrator's award, and awarded EPS attorneys' fees and costs. (Doc. # 59.) The Clerk of the Court entered the Amended Judgment in accordance with the Court's Order. (Doc. # 60.) The arbitrator's award and the Amended Judgment are hereinafter referred to as the "Arbitrator's Award." Shortly thereafter, TSYS satisfied the monetary portion of the Arbitrator's Award, and a Partial Satisfaction of Amended Judgment was filed by EPS. (Doc. # 61.)

Immediately after EPS moved for confirmation of the Arbitrator's Award, TSYS sought leave from the Court to file a supplemental or amended complaint to focus on the 1-800 portion of the Arbitrator's Award. (Doc. # 40.) TSYS argued that the parties disagreed about the meaning of this portion of the Arbitrator's Award. TSYS stated that there were several 1-800 numbers that had been assigned to EPS merchants, that other TSYS clients had also been assigned to these numbers, and that by turning over control of these 1-800 numbers, TSYS would incur substantial costs, be subjected to potential breach of contract claims from other clients, and risk data security breaches. The Court denied TSYS's motion to inject new arguments into this action, because the arguments did not constitute newly discovered evidence, and could have been raised before the arbitrator or earlier in this action. (Doc. # 59 at pp. 7–11.) The Court found that requiring TSYS to surrender the 1-800 numbers to EPS, as the arbitrator awarded, would not be manifestly unjust. (*Id.* at p. 10.)

Ten days after the Court issued the Amended Judgment, TSYS filed an action before Judge David G. Campbell to enjoin the enforcement of the Arbitrator's Award. *See TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC* ("*TSYS II*"), No. CV-10-01060-PHX-DGC. EPS filed a motion for summary judgment and argued that the action before Judge Campbell was barred by res judicata. Judge Campbell agreed, and on November 9, 2010, granted EPS's motion. *TSYS II*, 2010 WL 4642112 (D. Ariz. Nov. 9, 2010). TSYS then filed a motion for the entry of final judgment pursuant to Rule 54(b) of

the Federal Rules of Civil Procedure, which EPS did not oppose and Judge Campbell granted on November 29, 2010. *TSYS II*, 2010 WL 4920908 (D. Ariz. Nov. 29, 2010). TSYS then appealed Judge Campbell's decision to the Ninth Circuit Court of Appeals. *TSYS II*, Doc. # 70. The *TSYS II* appeal is currently pending.

II. ANALYSIS OF PENDING MOTIONS

EPS's original motion to compel (Doc. # 63) was filed less than two weeks after TSYS filed the action before Judge Campbell. TSYS's motion to stay proceedings before the Court (Doc. # 84) was filed after initiation of the proceedings before Judge Campbell, but fully briefed before TSYS filed its notice of appeal in *TSYS II*. EPS's supplemental motion to compel (Doc. # 85) was filed after Judge Campbell entered final judgment, and fully briefed after TSYS filed its notice of appeal in *TSYS II*. The Court will consider these motions in light of the proceedings in this action, as well as the proceedings before Judge Campbell.

A. EPS's Motions to Compel

On May 27, 2010, EPS filed its original motion to compel TSYS's compliance with the Arbitrator's Award. As a result of the proceedings before this Court and before Judge Campbell, EPS supplemented its motion. TSYS has satisfied the monetary portion of the Arbitrator's Award (Doc. # 61), but TSYS has refused to "provide EPS with immediate and continuous ownership, control and access to the toll free 1-800 number that connects EPS' merchants to a processor" as ordered by the arbitrator (Doc. # 1-2, Ex. B at p. 39), and affirmed by the Court (Doc. # 60 at ¶ 5). EPS seeks an order from the Court compelling TSYS to comply with the Arbitrator's Award.

TSYS has repeatedly sought to avoid compliance with the portion of the Arbitrator's Award concerning the conveyance of the 1-800 number to EPS. In its responses to EPS's motions to compel, TSYS raises the same objections to the conveyance of the 1-800 numbers that have been rejected in prior orders by this Court and by Judge Campbell.

In the Order denying TSYS's Combined Motion to Amend or Vacate Judgment Under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure (Doc. # 40), the Court held

that while TSYS "may disagree with the award issued by the arbitrator, [] attaching a new interpretation to the award hardly constitutes new evidence within the meaning of a Rule 59(e) motion." (Doc. # 59 at p. 9.) The Court considered TSYS's argument that "by turning control of these three numbers[1] over to [EPS], [TSYS] would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise." (*Id.*) The Court stated that: "Again, it is not clear why these arguments and evidence in support were not raised both before the arbitrator and in [TSYS]'s initial complaint to this Court. In essence, [TSYS] asks the Court to reconsider and re-weigh . . . the consequences of the arbitrator's award concerning the 1-800 number issue." (*Id.*) The Court further held:

> Even if [TSYS] is subjected to substantial costs, breach of contract claims, and potential security threats as it asserts, such results are the natural consequences of the arbitrator's award. In the arbitration context, the Court cannot grant the type of relief [TSYS] is ultimately seeking merely because the award will work a hardship for [TSYS.]

(*Id.* at pp. 9–10.) Upon examining the record, the Court found "[b]oth the testimony before the arbitrator and the award itself make clear that the 1-800 issue was fully litigated at the time of arbitration. [TSYS] has failed to demonstrate that its injuries are beyond its control such that it was precluded from raising these issues prior to the present motion." (*Id.* at p. 10.) In its responses to EPS's motions to compel, TSYS raises these same issues. The Court has already ruled on these issues, and TSYS has not presented the Court with any reason to rule differently in this Order.

In the order granting EPS's motion for partial summary judgment in the declaratory judgment action, Judge Campbell quoted extensively from this Court's prior ruling, and held that TSYS was "arguing that the relief sought by EPS and ordered by the arbitrator and Judge Teilborg is impractical, impossible, or inequitable"; thus, "TSYS seeks to assert an

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[1] The Court understands that there are not *three* 1-800 numbers at issue as previously thought by the parties, but rather EPS's merchants are connected to TSYS through *seven* 1-800 numbers that are shared with hundreds of thousands of non-EPS merchants. *See TSYS II*, 2010 WL 4642112, at *2 (D. Ariz. Nov. 9, 2010).

impossibility defense in this declaratory judgment action — in the guise of 'interpreting' the orders of the arbitrator and Judge Teilborg — that plainly could have been asserted in the arbitration and *TSYS I*." *TSYS II*, 2010 WL 4642112, at *3–4. Judge Campbell held that TSYS was barred by res judicata from raising defenses to the same claim — EPS's right to an exclusive 1-800 number that connects its merchants to a processor — that could have been asserted in the prior proceedings. *Id.* at *4. Judge Campbell concluded that "a final judgment was entered by the arbitrator and Judge Teilborg on EPS's claim for the 1-800 number. Under Arizona law, res judicata bars TSYS from now raising a defense to the claim that could have [been] raised in the arbitration proceeding and *TSYS I*." *Id.* at *6. Judge Campbell declined to permit TSYS to present evidence that was not presented to the arbitrator or this Court in an effort to show that the judgments cannot or should not be enforced. *Id.*

TSYS argues that conveying the 1-800 numbers to EPS will not achieve EPS's desired result, and as such, TSYS should not be ordered to comply. TSYS renews its argument that transferring the seven 1-800 numbers to EPS will not permit EPS to simply transfer the processing of merchant transactions to other providers, because hundreds of thousands of non-EPS merchant accounts cannot be transferred to a new provider unilaterally (by EPS). Further, TSYS again argues that public safety is at stake, if the 1-800 numbers are transferred to EPS along with the hundreds of thousands of non-EPS merchants still using those numbers. The Court does not deny "the important public interests involved in preserving the safety and security of processing millions of credit and debit card transactions . . . for tens of millions of consumers." (Doc. # 91 at p. 2.) However, compliance with the Arbitrator's Award does not require the draconian result envisioned by TSYS.

TSYS is not required to transfer the seven 1-800 numbers "while those seven numbers are still being used by hundreds of thousands of non-EPS merchants." (Doc. # 91 at p. 6) (emphasis omitted). The Arbitrator's Award gives TSYS latitude (1) to transfer EPS merchants to an exclusive 1-800 number that is not currently used by "hundreds of thousands of *non*-EPS merchants," or (2) to transfer non-EPS merchants to other 1-800 numbers. There

may be other methods of conveyance, too, that are beyond the Court's knowledge of this process.

Regardless of TSYS's method of conveying the 1-800 number or numbers to EPS, TSYS maintains that this "would be a complex and daunting task (to say the least)." (Doc. # 91 at p. 5.) This is a defense that TSYS should have raised during the arbitration, or before judgment was entered in this action. This Court and Judge Campbell have each held that the burdens TSYS will suffer as a result of complying with the Arbitrator's Award are neither defenses appropriately before the Court at this time, nor subject to "interpretation" by Judge Campbell.

The Court acknowledges that "TSYS has consistently and repeatedly raised the difficulties associated with compliance with EPS'[s] interpretation of the Amended Judgment with EPS, this Court, and Judge Campbell." (*Id.*) However, TSYS failed to raise these difficulties before the arbitrator or this Court in a timely fashion, and further action is barred by res judicata. Accordingly, these defenses have been waived, and TSYS must find a way to comply with the Arbitrator's Award, even if compliance is complex and daunting.

The Arbitrator's Award calls for "immediate and continuous ownership, control and access to the toll-free 1-800 number that connects EPS'[s] merchants to a processor." TSYS argues that "there is no 'EPS number,' which makes it impossible to simply and immediately convey one to EPS." (*Id.* at p. 1.) However, TSYS refuses even to begin the conveyance process, despite the Court's confirmation of the Arbitrator's Award.[2] The Court finds no reason for TSYS to continuing delaying its compliance with the Arbitrator's Award. TSYS asks the Court to "defer ruling on the Supplemental Motion and allow the issues to be resolved in an orderly fashion." (*Id.* at p. 2.) The Court finds that the issues have been resolved in an orderly fashion; specifically, they have been resolved in EPS's favor.

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[2] The Court notes that TSYS has notified non-EPS merchants that the seven 1-800 numbers at issue in this action are no longer available for downloading into merchant terminals. (Doc. # 91 at p. 3 n.1.) This step avoids new non-EPS merchants from using the seven 1-800 numbers already used by hundreds of thousands of merchants.

TSYS spends much of its response to the original motion to compel arguing that 1-800 numbers are scarce public resources that cannot be owned by a carrier or subscriber. TSYS argues that one toll-free subscriber cannot simply be substituted for another toll-free subscriber. (Doc. # 71.) The Court finds this argument disingenuous in light of TSYS's prior offer to EPS. On October 5, 2009, TSYS sent EPS a letter offering to provide EPS with a 1-800 number, which EPS rejected. (*Id.* at p. 3; Doc. # 75 at p. 5.) The Court found the offer did not satisfy the thrust of the Arbitrator's Award that EPS is entitled to control over its merchants in the event EPS decides not to retain TSYS's services. (Doc. # 59 at p. 8.) The Court also stated that the goal of the arbitrator was not to award EPS a single telephone number not currently used by EPS. (*Id.* at pp. 8–9.)

EPS, in its original motion to compel, seeks a finding of contempt and/or sanctions against TSYS pursuant to Rule 70 of the Federal Rules of Civil Procedure for failure to comply with the Arbitrator's Award. At this time, the Court will not issue a finding of contempt against TSYS, provided that, upon receipt of this Order, TSYS immediately begins to convey the 1-800 number or numbers to EPS. The Court recognizes that this conveyance process may be complex and daunting; nevertheless, TSYS is ordered to comply immediately.

TSYS argued, during the hearing before the Court on January 25, 2011, that it would take a minimum of two years to convey the 1-800 number or numbers to EPS. According to EPS, the time it will take to convey the 1-800 number or numbers is simply determined by the amount of resources and manpower expended by TSYS to achieve the result. TSYS did not counter this argument. Accordingly, the Court will give TSYS 90 days, from the date of this Order, to fully comply with the Arbitrator's Award.

During the hearing, EPS requested that in the event TSYS fails to fully comply with the Arbitrator's Award within 90 days of this Order, the Court should assess of a monetary penalty against TSYS in the amount of $1,000,000 per day for each day that TSYS refuses to comply with the Arbitrator's Award. The Court will seriously entertain EPS's request.

Based on the foregoing, the Court grants EPS's supplemental motion to compel, and

orders TSYS to perform all steps necessary to accomplish the transfer of the 1-800 number or numbers within 90 days of this Order. To the extent the original motion to compel requests additional relief, the Court will deny that motion in part.

B. TSYS's Motion to Stay

TSYS has moved the Court for an order staying proceedings in this matter pending the appeal of Judge Campbell's ruling in *TSYS II*. TSYS argues that a stay is warranted for the following reasons: (1) the 1-800 numbers at issue are currently being used by hundreds of thousands of non-EPS merchants; (2) there is a likelihood that millions of consumers who make credit or debit card purchases with non-EPS merchants will be directly and adversely impacted; (3) there is a likelihood that data security will be compromised due to EPS's access to confidential and proprietary information; and (4) the disruptions to TSYS's processing system subject TSYS to possible substantial liability to its clients. (Doc. # 84 at p. 2–3.) These are the same reasons TSYS argued, unsuccessfully, for leave to supplement its complaint, for declaratory judgment in *TSYS II*, and for denial of EPS's motions to compel.

The parties disagree as to which standard the Court should apply in evaluating TSYS's motion to stay. TSYS argues that its motion to stay is governed by the *Landis* cases. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see also Clinton v. Jones*, 520 U.S. 681, 706–07 (1997). EPS argues, and the Court agrees, the motion to stay is governed by Rule 62 of the Federal Rules of Civil Procedure.

1. Application of Rule 62

The Court granted summary judgment in favor of EPS (Doc. # 33), and affirmed the arbitrator's decision in its entirety (Doc. # 60). The Arbitrator's Award constitutes a final judgment, and EPS has moved to compel TSYS's compliance with this judgment. Accordingly, Rule 62 applies, because it governs the stay of proceedings to enforce a judgment.

The Court finds that under the applicable rule, there is no basis for staying EPS's enforcement of the Court's final judgment. The automatic 14-day stay following entry of

judgment under Rule 62 expired several months ago. FED.R.CIV.P. 62(a). Rule 62 permits the Court to stay the execution of a judgment pending disposition of post-judgment motions. FED.R.CIV.P. 62(b). However, the Court denied TSYS's post-judgment motions on May 4, 2010. (Doc. # 59.) TSYS has not filed an appeal in this action, and TSYS has not posted a supersedeas bond. FED.R.CIV.P. 62(c)–(d). Subsections (e), (f), (g) and (h) of Rule 62 are not applicable to this action. Accordingly, staying the motion to compel enforcement of the Arbitrator's Award is not warranted under Rule 62.

2. Analysis of the *Landis* Cases

TSYS's reliance on the *Landis* cases is misplaced. In *Landis*, the Government sought a stay of proceedings in two actions in which the Government had not filed yet answers, so that it could prosecute its test lawsuit concerning the constitutionality of the statute at issue in each of the actions. 229 U.S. at 250–51. The stay was granted by the district court, because "the trial of a multitude of suits would have a tendency to clog the courts." *Id.* at 251. However, the Supreme Court found that granting a stay until determination of an appeal by the Supreme Court was an abuse of discretion. *Id.* at 256–57. In *CMAX*, the defendant moved for a continuance of the trial until the resolution of proceedings against the plaintiff before the Civil Aeronautics Board. 300 F.2d at 266. In *Clinton*, the district court ruled that discovery could go forward, but that the trial would be stayed until the sitting President was no longer in office. 520 U.S. at 687. However, the Supreme Court found the decision to stay the trial was premature. *Id.* at 708. In *Leyva v. Certified Grocers of California, Ltd.*, prior to the initiation of discovery, the action in district court was stayed due to a binding arbitration provision in a collective bargaining agreement. 593 F.2d 857, 859–60 (9th Cir. 1979). Finally, in *Keating v. Office of Thrift Supervision*, the defendant claimed his due process rights were violated by the administrative law judge's refusal to stay the administrative proceedings until the conclusion of the state and federal criminal proceedings. 45 F.3d 322, 324 (9th Cir. 1995). The Court of Appeals upheld the denial of the stay, and affirmed the final order of the administrative law judge. *Id.* at 328.

Contrary to the pre-trial status of the *Landis* cases, this action has already resulted in

final judgment. The only remaining issue in this action is the enforcement of the partially satisfied Arbitrator's Award. Accordingly, TSYS's reliance on the *Landis* cases is off-base.

Even applying the standard set forth in the *Landis* cases, stay of proceedings is not warranted. In considering whether to grant a stay, the *Landis* cases set forth the following standard:

> A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants. The exertion of this power calls for the exercise of a sound discretion. Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

CMAX, 300 F.2d at 268 (citing *Landis*, 299 U.S. at 254–55).

As discussed above, the Arbitrator's Award does not necessarily result in the parade of horribles argued by TSYS.[3] Further, as this Court and Judge Campbell have previously held, TSYS raises logistical defenses to the Arbitrator's Award that should have been raised before the arbitrator. The Court finds no reason to stay enforcement of the final judgment based on arguments that have repeatedly been rejected in *TSYS I* and *TSYS II*. Certainly, TSYS will face a hardship by complying with the Arbitrator's Award. However, the enforcement of final judgment against an unsuccessful party is inherently a hardship to that party. The Court does not find this is the kind of hardship that warrants a stay under the standard set forth in the *Landis* cases.

TSYS argues that EPS will not be harmed if the Court "simply maintains the status quo by granting the stay." (Doc. # 84 at p. 6.) The Court disagrees. The "status quo" TSYS refers to is its partial compliance with the Arbitrator's Award. EPS has been deprived of the benefit of its bargain under the 2005 agreement with TSYS. EPS is harmed by TSYS's

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[3] EPS persuasively argues that "TSYS should not be allowed to further postpone doing what the Court ordered because of a problem TSYS caused, refuses to solve, and continues to exacerbate." (Doc. # 88 at p. 9.)

refusal to comply with the Arbitrator's Award, which was originally awarded two years ago (Doc. # 1-2, Ex. B), and was affirmed by the Court more than six months ago (Doc. # 60).

Granting TSYS's stay would not be an efficient use of judicial resources. The Court granted summary judgment in EPS's favor, affirmed the Arbitrator's Award, and denied TSYS's post-judgment motions. Staying proceedings at this juncture is not convenient for the Court in the management of its docket. Further, if TSYS's appeal in *TSYS II* is unsuccessful, then it is likely that TSYS will continue its refusal to comply with the Arbitrator's Award by filing another action and/or seeking another stay, even though TSYS's defenses to the enforcement of the 1-800 number portion of the Arbitrator's Award have been rejected on several occasions. Staying this proceeding while TSYS pursues its appeal of Judge Campbell's decision in *TSYS II* is unnecessary, and against the interests of EPS, the successful party in this action.

Additionally, for the reasons discussed above, the Court will not consider TSYS's unauthorized Supplement to Its Motion to Stay Proceedings to Enforce Judgment (Doc. # 98).

III. CONCLUSION

Based on the foregoing, the Court grants EPS's motions to compel, and denies TSYS's motion to stay proceedings.

Accordingly,

IT IS ORDERED that Defendant Electronic Payment Systems, LLC's Supplemental Motion to Compel (Doc. # 85) is **GRANTED**.

IT IS FURTHER ORDERED that TSYS shall fully comply with the unsatisfied portion of the Arbitrator's Award within 90 days of this Order. If TSYS has not transferred its interest in the 1-800 number or numbers to EPS on the 91st day after issuance of this Order, then EPS may request, and the Court will grant, a hearing to show cause as to why TSYS should not be found in contempt and sanctions imposed for failure to comply with this Order and the Arbitrator's Award.

IT IS FURTHER ORDERED that Defendant Electronic Payment Systems, LLC's

Motion to Compel Plaintiff's Compliance with Court's Judgment and/or for Finding of Contempt and Imposition of Sanctions (Doc. # 63) is **GRANTED IN PART** to the extent compliance is ordered, and **DENIED IN PART** with respect to the request for a finding of contempt and imposition of sanctions.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Proceedings to Enforce Judgment (Doc. # 84) is **DENIED**.

IT IS FINALLY ORDERED that Plaintiff's Supplement to Its Motion to Stay Proceedings to Enforce Judgment (Doc. # 98) is **DENIED** and ordered stricken from the record.

DATED this 28th day of January, 2011.

James A. Teilborg
United States District Judge

EXHIBIT D

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC, Plaintiff, vs. Electronic Payment Systems, LLC, Defendant.	No. CV-09-00155-PHX-JAT **ORDER**

Pending before the Court is Defendant Electronic Payment Systems, LLC's Motion for Reconsideration. (Doc. # 104.) Pursuant to the Court's order, TSYS responded to the Motion. (Doc. # 107.) Upon review of its January 28, 2011 Order, the Court is now aware of an inconsistency in its language on page six of that Order that eroded the purpose and effect of the Order, and was contrary to the to the intent of the Arbitrator's Award. In granting the Motion for Reconsideration, the Court is removing a statement that may have had an unintended effect on the compliance ordered by the Court.

The Court has reviewed and carefully considered the arguments presented by TSYS, particularly with respect to the issues concerning TSYS's petition to the Federal Communications Commission. However, the Court is not persuaded by TSYS's arguments. TSYS continues to ignore the role of this Court, which is to enforce the Arbitrator's Award. TSYS continues to raise issues and arguments that should have been presented during the

arbitration, but were not, and now are not properly before the Court. The Order granting EPS's motion to compel (Doc. # 102) provided that if TSYS has not transferred its interest in the 1-800 number or numbers within 90 days, then the Court will conduct a contempt hearing. Therefore, TSYS's request for an evidentiary hearing is denied. The contempt hearing, if necessary, will provide TSYS with the opportunity to purge itself of a contempt finding, and TSYS can present evidence at that time.

Accordingly, the Court will grant the Motion to Reconsider, and revise its prior Order as follows:

IT IS ORDERED that Defendant Electronic Payment Systems, LLC's Motion for Reconsideration (Doc. # 104) is **GRANTED**.

IT IS FURTHER ORDERED that the effective date of the Order, dated January 28, 2011 (Doc. # 102), deemed to be February 15, 2011.

IT IS FURTHER ORDERED that the final paragraph on page six of the Order, dated January 28, 2011 (Doc. # 102), is deleted in its entirety and replaced with the following paragraph:

> TSYS is not required to transfer the seven 1-800 numbers to EPS "while those seven numbers are still being used by hundreds of thousands of non-EPS merchants." (Doc. # 91 at p. 6) (emphasis omitted). The Arbitrator's Award gives TSYS latitude to transfer non-EPS merchants to other 1-800 numbers, but this provision does not diminish the obligation of TSYS to move with rapidity to fulfill the orders of the Court.

IT IS FURTHER ORDERED that TSYS's request for an evidentiary hearing is **DENIED**.

DATED this 15th day of February, 2011.

James A. Teilborg
United States District Judge

EXHIBIT E

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC, Plaintiff, vs. Electronic Payment Systems, LLC, Defendant.	No. CV10-1060 PHX DGC **ORDER**

Defendant Electronic Payment Systems, LLC ("EPS") has moved for partial summary judgment. Doc. 40. Plaintiff TSYS Acquiring Solutions, LLC ("TSYS") opposes the motion. Doc. 51. The parties have fully briefed the motion, and the Court heard oral argument on November 4, 2010. For reasons stated below, the Court will grant the motion.

I. Background.

EPS contracted for TSYS to provide credit card payment processing services for EPS customers. As part of the parties' contract, TSYS agreed to install an exclusive 1-800 number on the point-of-sale terminals of EPS's merchant customers. EPS sought the exclusive number because it would permit EPS to move its merchant portfolio to another payment processing vendor if problems arose with TSYS, a need that was material to EPS's decision to procure services from TSYS. Disagreements between the parties ultimately led to arbitration. EPS claimed in the arbitration that TSYS had promised to provide it with the exclusive 1-800 number and sought to recover the number in the arbitration proceeding. The arbitrator – retired Arizona Supreme Court Justice Robert Corcoran – agreed and ordered

"TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS' merchants to a processor." Doc. 41-2 at 40. The arbitrator also awarded EPS more than $2,600,000 in damages. *Id.*

On January 26, 2009, TSYS sought to vacate the arbitrator's award *in toto* by filing a complaint in this Court that was assigned to Judge James A. Teilborg. *See TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC,* No. CV-09-0155-PHX-JAT. The Court will refer to the action before Judge Teilborg as "*TSYS I.*" Despite the fact that it sought to have the arbitration agreement vacated in its entirety, TSYS focused its arguments before Judge Teilborg primarily on the damages award. On May 4, 2010, Judge Teilborg entered an Amended Judgment that confirmed the arbitrator's award, granted summary judgment for EPS, and dismissed TSYS's complaint. The judgment included the arbitrator's order for "TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS' merchants to a processor." Doc. 41-24 at 27.

TSYS filed a motion under Rules 59 and 60 asking Judge Teilborg for permission to file a supplemental or amended complaint. The motion focused on the 1-800 portion of the order and argued that TSYS and EPS disagreed on its meaning. TSYS argued that it could satisfy the order by providing EPS with any 1-800 number, regardless of whether it connected any EPS merchants to a processor. EPS claimed that it was entitled to the actual 1-800 number that connected its merchants to a processor. TSYS noted in its motion that there were, in fact, several 1-800 numbers that had been assigned to EPS merchants, that other TSYS clients had also been assigned to these numbers, and that "by turning control of these . . . numbers over to [EPS], [TSYS] would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise." *TSYS I*, 2010 WL 1781015 at *5 (D. Ariz. May 4, 2010). Judge Teilborg denied the motion to inject these new arguments in the case, noting that they could have been raised before the arbitrator and earlier in the case before Judge Teilborg and therefore did not constitute newly discovered evidence. *Id.* Judge Teilborg also concluded that requiring TSYS to comply with the order to surrender the numbers to EPS would not be manifestly unjust. *Id.*

Ten days later, on May 14, 2010, TSYS filed this action to enjoin enforcement of the arbitrator's award and Judge Teilborg's order. TSYS makes arguments in this case which Judge Teilborg declined to entertain in TSYS's motion under Rules 59 and 60. TSYS asserts that the 1-800 number awarded to EPS by the arbitrator does not exist, and that EPS's merchants in fact are connected to TSYS through seven 1-800 numbers that are shared with hundreds of thousands of non-EPS merchants. TSYS argues that giving EPS control over these numbers will put these third parties at risk and will cause TSYS to be in breach of its other client contracts.

EPS's motion for summary judgment asserts that the TSYS complaint in this action is barred by *res judicata*. The Court agrees.

II. Legal Standards.

A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

In making their respective arguments regarding the res judicata effect of Judge Teilborg's decision in *TSYS I*, both TSYS and EPS rely on federal res judicata principles. These principles do not apply. *TSYS I* was brought under federal diversity jurisdiction. *See TSYS I*, Doc. 1; *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004) ("It is well established that even when a petition is brought under the Federal Arbitration Act (FAA), a petitioner seeking to confirm or vacate an arbitration award in federal court must establish an independent basis for federal jurisdiction."). When seeking to determine the res judicata effect of a judgment entered in a diversity-jurisdiction case, courts apply the law of the state where the court which entered the judgment sits. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001). Judge Teilborg sits in Arizona, and the res

judicata effect of his judgment must therefore be determined under Arizona law. *Id.*

Under Arizona law, "[t]he doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action." *Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999). Arizona law does not follow the transaction test applied in the federal cases cited by the parties. Rather, in Arizona, "[t]wo causes of action which arise out of the same transaction or occurrence are not the same for purposes of res judicata if proof of different or additional facts will be required to establish them." *E.C. Garcia & Co. v. Arizona State Dept. of Revenue*, 875 P.2d 169, 179 (Ariz. App. 1993) (citing *Rousselle v. Jewett*, 421 P.2d 529 (Ariz. 1966)).[1]

III. Applying *Res Judicata* to This Case.

Arizona law establishes four general requirements for res judicata: (1) the same claim was adjudicated previously, (2) by a "judgment on the merits," (3) issued by "a court of competent jurisdiction," (4) against the same parties or their privies. *See Hall*, 977 P.2d at 779. Only the first two elements are in dispute here.

A. Same Claim.

In Arizona, two claims are not identical if "different or additional facts will be required to establish them." *E.C. Garcia & Co.*, 875 P.2d at 179 (citing *Rousselle*, 421 P.2d at 529). In this case, there is only one claim at issue: EPS's right to an exclusive 1-800 number that connects EPS merchants to a credit card processing provider. TSYS does not dispute that the arbitrator found EPS was entitled to obtain such a number from TSYS, nor that both the arbitrator and Judge Teilborg ordered TSYS to provide EPS with immediate

[1] The Court notes that the result would be the same in this case even if federal res judicata law were applied. The Court concludes *infra* that Arizona res judicata principles bar TSYS from asserting defenses that could have been asserted before the arbitrator and Judge Teilborg. Federal law would support the same conclusion. *See Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009) (holding that res judicata applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose" (internal quotation marks and citation omitted)).

ownership, control, and access to the number.

TSYS instead argues that it is asking this Court only to "interpret" what the arbitrator and Judge Teilborg meant when they ordered TSYS to give EPS the number. But in rendering this "interpretation," TSYS asks the Court to consider the following facts that were in existence at the time of the arbitration and *TSYS I* but were never presented to the arbitrator or Judge Teilborg: (1) the complex nature of the debit/credit card processing system; (2) that there are seven 1-800 numbers that connect EPS's merchants to a processor; (3) that those same seven numbers are also being used to process transactions for over 515,000 non-EPS merchants; (4) that the numbers are controlled by organizations regulated under federal law, not by TSYS; (5) that TSYS installed proprietary software on the credit card machines of EPS merchants – information that will be compromised if EPS is given control of the toll free numbers; and (6) that data security will be compromised for non-EPS merchants and millions of debit and credit card holders if EPS is given control of the numbers. Doc. 51 at 13.

Contrary to TSYS's adamant argument, the Court's consideration of these facts would not constitute an "interpretation" of what the arbitrator and Judge Teilborg meant in their orders. The Court could not determine what these judges meant by examining facts and evidence they never considered. More importantly, the plain import of these facts is that TSYS cannot, or should not be required to, "provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor" as ordered by the arbitrator and Judge Teilborg. This is not a matter of interpretation; it is a matter of defense. TSYS is arguing that the relief sought by EPS and ordered by the arbitrator and Judge Teilborg is impractical, impossible, or inequitable. Impossibility of performance or its variant, commercial frustration, can be a defense to a breach of contract claim or to a specific performance remedy. *See, e.g., 7200 Scottsdale Road Gen. Partners v. Kuhn Farm Mach.*, 909 P.2d 408, 346-47 (Ariz. App. 1995); *Marshick v. Marshick*, 545 P.2d 436, 439-40 (Ariz. App. 1976). Thus, it is a defense, not an interpretation, that TSYS really seeks to assert in this case.

In Arizona, "a judgment in favor of a plaintiff is *res judicata* as against the defendant on every defense raised *or which he could have raised* as a defense against the complaint." *In re Kopely*, 767 P.2d 1181, 1183 (Ariz. App. 1988) (emphasis added); *accord Pettit v. Pettit*, 189 P.3d 1102, 1106 (Ariz. App. 2008) (father barred by res judicata from asserting paternity defense he could have asserted, but failed to assert, in marriage dissolution proceeding); *see also Hall*, 977 P.2d at 779 (res judicata applies when "the matter now in issue between the same parties or their privities was, or might have been, determined in the former action"). TSYS seeks to assert an impossibility defense in this declaratory judgment action – in the guise of "interpreting" the orders of the arbitrator and Judge Teilborg – that plainly could have been asserted in the arbitration and *TSYS I*.

In sum, the "same claim" requirement of res judicata is satisfied. This case concerns the same claim that was at issue in the arbitration and *TSYS I* – EPS's right to an exclusive 1-800 number that connects its merchants to a processor. TSYS is barred from raising defenses to that claim that could have been asserted in the prior proceedings.

B. Final Judgment on the Merits.

TSYS also argues that there was no final judgment on the matter it seeks to litigate here. Doc. 51 at 16. TSYS cites to *In re Kopely*, 767 P.2d at 1183, for the proposition that a judgment is not res judicata if the court "expressly states that it is not deciding an issue which was raised and could have been decided." Doc. 51 at 16. TSYS argues that Judge Teilborg expressly stated that he did not decide the issue asserted here, and that res judicata therefore cannot bar its adjudication in this case. The Court disagrees.

When TSYS filed this action, EPS filed a motion asking Judge Teilborg to transfer this case to him. Judge Teilborg declined, noting that EPS had not satisfied the requirements of Local Rule of Civil Procedure 42.1. Judge Teilborg also provided this explanation as to why transferring the case to him would not serve the purposes of judicial economy:

> In any event, the Court does not find that the interests of judicial economy are best served by transferring the declaratory relief action to the undersigned. The original action involved only whether the arbitration award should be vacated. Although the 1-800 number issue was raised in a post-judgment motion, the Court did not have occasion to substantively resolve the issue, as

> the Court was presented only with the issue of whether Rules 59 or 60 permitted an amended or supplemental complaint. Because the 1-800 number issue presents a different legal analysis than vacatur of the arbitration award, the Court does not believe that the interests of judicial economy are best served by transferring the declaratory judgment action to the undersigned.

TSYS I, Doc. 79 at 2.

This statement by Judge Teilborg does not fall within the *Kopely* exception to res judicata. As *Kopely* explained: "If a trial court or an appellate court expressly states that it is not deciding an issue *which was raised and could have been decided*, the presumption cannot prevail, and the judgment is not *res judicata* as to the undecided issue." 767 P.2d at 1183 (emphasis added). As noted above, TSYS's impossibility defense was never raised before the arbitrator or Judge Teilborg issued their orders. TSYS sought to inject the defense into Judge Teilborg's case subsequently through the motion under Rules 59 and 60, but Judge Teilborg rejected the attempt. His ruling on the motion is worth quoting at some length, because it reinforces the Court's application of res judicata in this case:

> [TSYS] asserts that the newly discovered evidence – namely, the disagreement between the parties concerning the meaning of the award of the 1-800 number – did not come to light until October 2009. The Court disagrees. The arbitrator issued his award in January 2009. It is clear from the face of the award what the arbitrator ordered: that [TSYS] turn over control of the numbers that connect [EPS's] customers to a processor. [TSYS] focuses on the word *the*, but misses the thrust of the arbitrator's finding and conclusion; namely, that [EPS] is to be awarded control over its merchants in the event [EPS] decides not to retain [TSYS's] services. It was not the goal of the arbitrator, as mentioned throughout his award, to award [EPS] a single telephone number; rather, [EPS] was seeking ownership and control of the numbers its merchants use. . . .
>
> [TSYS] may disagree with the award issued by the arbitrator, but attaching a new interpretation to the award hardly constitutes new evidence within the meaning of a Rule 59(e) motion. At most, the parties have discovered a new disagreement, but not new evidence within the meaning of a Rule 59(e) motion. Moreover, the Court fails to see why this issue was not raised with [TSYS's] original filing in January 2009; or at the very least, upon receiving [EPS's] February 2009 letter. The Court finds that [TSYS] failed to present newly discovered or previously unavailable evidence such that Rule 59(e) relief is appropriate.

TSYS I, 2010 WL 1781015 at *5 (D. Ariz. May 4, 2010) (emphasis in original).

Judge Teilborg provided the following explanation in response to TSYS's argument that it should be allowed to inject the impossibility defense into the case to avoid manifest

injustice:

> [TSYS] argues that not granting it leave to file a supplemental complaint would work a manifest injustice, as the . . . numbers that [EPS's] merchants use to connect to a processor are also used by other merchants besides [EPS's] customers. Hence, [TSYS] asserts, by turning control of these . . . numbers over to [EPS], [TSYS] would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise. Again, it is not clear why these arguments and evidence in support were not raised both before the arbitrator and in [TSYS's] initial complaint to this Court. In essence, [TSYS] asks the Court to reconsider and re-weigh – should the Court allow a Rule 15 amendment – the consequences of the arbitrator's award concerning the 1-800 number issue. . . . Even if [TSYS] is subjected to substantial costs, breach of contract claims, and potential security threats as it asserts, such results are the natural consequences of the arbitrator's award. In the arbitration context, the Court cannot grant the type of relief [TSYS] is ultimately seeking merely because the award will work a hardship for [TSYS]. [TSYS's] complaints resulting from the arbitration award do not constitute manifest injustice within the meaning of Rule 59(e).

Id. (emphasis added).

In summary, Judge Teilborg denied TSYS's post-judgment motion because TSYS sought to inject a new issue into the case – the impossibility defense – that could have been raised earlier but was not. When Judge Teilborg subsequently declined to transfer the instant case to him, and explained in the process that the issues in this case had not been considered substantively by him, he was referring to the fact that TSYS failed to raise the issues in his case and sought to inject them only in the post-judgment motion. This clearly is not the exception to res judicata discussed in *Kopely* – where a court expressly states that it is not deciding an issue "which was raised and could have been decided." 767 P.2d at 1183. To the contrary, TSYS's impossibility defense was not raised in a timely manner before Judge Teilborg and he therefore never addressed it.

In sum, a final judgment was entered by the arbitrator and Judge Teilborg on EPS's claim for the 1-800 number. Under Arizona law, res judicata bars TSYS from now raising a defense to the claim that it could have raised in the arbitration proceeding and *TSYS I*.

C. The Applicability of Res Judicata.

In addition to arguing that res judicata, if applied, would not bar its claim, TSYS also contends that res judicata does not apply here because "[c]ourts consistently consider declaratory judgment actions to interpret or clarify judgments," and that "res judicata does

not bar a party from seeking declaratory relief to interpret a court's confirmation of an arbitration award." Doc. 51 at 7-8. This argument fails because, as explained above, TSYS does not seek an interpretation of the arbitrator's or Judge Teilborg's orders. TSYS seeks to present evidence never presented to the arbitrator and Judge Teilborg to show that their judgments cannot or should not be enforced.

In addition, the legal authority cited by TSYS does not support its position. TSYS cites cases from states other than Arizona, chief among them *Sandler v. Casale*, 178 Cal. Rptr. 265, 268 (App. 1981), and *Int'l Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan*, 805 P.2d 340, 343 (Alaska 1991). These cases apply California and Alaska law, respectively, and involve declaratory judgments to clarify terms in arbitration decisions, not to collaterally attack those decisions and the judicial judgments that confirm them. Therefore, they are not controlling in this case.

TSYS has cited no case for the proposition that, under Arizona law, a court judgment that confirms an arbitration award would fall outside res judicata's reach within the context of a declaratory action. In fact, case law suggests that Arizona courts apply res judicata in declaratory suits that seek to collaterally attack prior judgments. *See Shattuck v. Shattuck*, 192 P.2d 229, 235 (Ariz. 1948) ("[Arizona's declaratory judgment statute] does not expressly or by implication authorize a court to entertain a proceeding to determine any questions of the construction or validity of a judgment or decree of a court of competent jurisdiction, or to declare the rights or legal relations of interested parties thereunder"), *disapproved of on other grounds by Marvin Johnson, P.C. v. Myers*, 907 P.2d 67 (Ariz. 1995); *accord Schwamm v. Superior Court In and For Pima County*, 421 P.2d 913, 914 (Ariz. App. 1966) (interpreting, *inter alia*, *Shattuck* as being rooted in "the general principle that persons who have had an opportunity to litigate a matter should not be permitted to relitigate the same matter in a different action").

IV. The Propriety of a Declaratory Action in this Context.

The Court would be justified in dismissing TSYS's claim even if TSYS sought merely to clarify Judge Teilborg's order. The Federal Declaratory Judgment Act ("FDJA") states that "[i]n a case of actual controversy within its jurisdiction [with noted exceptions] . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). In a diversity case, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), the United States Supreme Court concluded that the FDJA "created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." The Court added that "a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close." *Id.* Factors to consider when exercising discretion to dismiss include the futility of the action, the existence of parallel proceedings that permit the "ventilation" of the issues, avoiding duplicative litigation, avoiding forum shopping and procedural fencing, and other considerations of "practicality and wise judicial administration."[2] *Wilton*, 515 U.S. at 288; *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942); *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 802-04 (9th Cir. 2002); *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 & n.5 (9th Cir. 1998) (en banc).

In this case, parallel proceedings are being conducted before Judge Teilborg to enforce his judgment (*TSYS I*, Doc. 63), and TSYS can raise the present considerations in that proceeding as a means of arguing that it is not violating the judgment. Thus, this Court

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[2] Though the Supreme Court referred to the existence of parallel state proceedings in *Wilton*, 515 U.S. at 290, the existence of parallel federal proceedings in the same district would have the same "parallel litigation" effect in light of judicial economy concerns noted in *Wilton*. Moreover, Ninth Circuit law permits a district court to dismiss a declaratory claim even if parallel state proceedings do not exist. *E.g.*, *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002). *Wilton* also noted that it was not "delineat[ing] the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law." *Wilton*, 515 U.S. at 290.

would dismiss TSYS's declaratory judgment request even it is was limited to interpreting Judge Teilborg's order.

IT IS ORDERED:

1. EPS's motion for summary judgment (Doc. 40) is **granted**.
2. The Rule 16 Case Management Conference current set for **November 12, 2010 at 4:00 p.m.** is **vacated** and **reset** to **December 21, 2010 at 4:30 p.m.** to address EPS's remaining counterclaims.

DATED this 9th day of November, 2010.

David G. Campbell
United States District Judge

EXHIBIT F

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC, Plaintiff, vs. Electronic Payment Systems, LLC, Defendant.	No. CV 09-0155-PHX-JAT **ORDER**

Pending before the Court are Defendant Electronic Payment Systems, LLC's Motion for Attorneys' Fees and Related Non-Taxable Expenses (Doc. # 35); Defendant's Motion to Amend Judgment (Doc. # 39); Plaintiff TSYS Acquiring Solution, LLC's Combined Motion to Amend or Vacate Judgment Under Rules 59(e) and 60(b) and Motion for Leave to File a Supplemental Pleading Under Rule 15(d) (Doc. # 40); Defendant's Amended Motion to Amend Judgment (Doc. # 44); and Plaintiff's Motion to Strike Document Numbers 42 and 44 (Doc. # 46). The Court now rules on the motions.

I. Background

On October 22, 2009, the Court entered summary judgment in favor of Defendant.[1] That same day, the Clerk of the Court entered judgment according to this Court's direction. Concerned that the judgment entered did not contain any reference to the arbitration award,

[1] For a recitation of the pertinent facts, see Doc. # 33.

nor specific language pertaining to the dollar amounts contained in the arbitration award, Defendant sought to amend the judgment entered. Defendant also applied for a writ of garnishment, which was denied due to a lack of specificity in the judgment.

II. Defendant's Motion for Attorneys' Fees

Defendant moves for its attorneys' fees and related non-taxable expenses incurred in connection with the vacatur proceedings in this Court. In response, Plaintiff argues that the parties agreement does not provide a basis for Defendant to recover attorneys fees. The Court disagrees.[2]

Section 7.1 of the parties' agreement contains the following provision:

> [TSYS] Indemnification. [TSYS] shall be liable to and shall indemnify and hold EPS from and against any and all loss, liability, cost, damage and expense, including litigation expenses and reasonable attorneys' fees and allocated costs for in-house legal services, to which EPS may be subjected or which it may incur in connection with any claims which arise from or out of or as a result of the negligen[t] acts or omissions of [TSYS], its officers, employees, agents and affiliates in the performance of their duties and obligations under this Agreement.

(Doc. # 1-1, p. 22, at ¶ 7.1.) Plaintiff argues that this provision is simply a promise to indemnify Defendant from any third-party claims against Defendant. However, the plain language of Section 7.1 is not so limiting. Section 7.1 states that Plaintiff shall be liable to Defendant for *all* litigation expenses and attorneys' fees Defendant incurs as a result of the negligent acts of Plaintiff, and not just those of third-party claims. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "indemnify" as: "To reimburse (another) for a loss suffered because of a third party's or one's own act or default."). The arbitrator specifically found that Plaintiff was negligent in mapping over the information referred to as billing element tables ("BET"). *See* Doc. # 42-1, pp. 34-35 ("Furthermore, the Arbitrator notes that interpreting Section 7.6 to excuse TSYS's negligence in transferring the BETs would be

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[2] The Court denies Defendant's other two asserted basis for attorneys' fees, as the Court does not believe Plaintiff's action has been frivolous, without merit, brought for an improper purpose, or for any other basis subjecting it to 28 U.S.C. § 1927 or Rule 11 sanctions.

directly contrary to the indemnification provisions of Section 7.1 which expressly make TSYS liable to EPS for any negligent acts or omissions by TSYS. . . . TSYS cannot be heard to complain about their own failure to act. . . . Accordingly, the Arbitrator finds that TSYS breached its agreement to accurately map over the BET's and that such beach proximately caused EPS damages between April 2006 and June 2007 in the amount of $2,671,463.57, for which EPS is entitled to be compensated."). Because the only aspect of the award Plaintiff sought vacatur of in this Court was the BET breach of contract claim, and because the arbitrator found that the BET claim arose because of Plaintiff's negligent acts and omissions, per Section 7.1 of the parties' agreement, Defendant is entitled to its attorneys' fees. The Court will next consider the reasonableness of Defendant's claimed attorneys' fees.

Defendants attached to its memorandum in support of attorneys' fees detailed billing summaries as well as affidavits in support of its request for attorneys' fees. Defendants' attorney, Mr. Krob, charges $225 per hour, while Defendant's local counsel, Mr. McCoy, charges $195 per hour. Mr. Krob has practiced law for nearly thirty years, and has experience as a former judge. Mr. McCoy has more than eight years experience as an attorney. Plaintiffs do not object to the hourly rates charged by Mr. Krob and Mr. McCoy. These rates are similar, if not below, those charged by other Phoenix attorneys with the same amount of experience. Therefore, the Court finds that the hourly rates charged by Defendants' attorneys are reasonable.

Plaintiff argues that Defendant's time records to not comply with LRCiv 54.2. Specifically, Plaintiff asserts that certain of Defendant's attorneys' time entries are unreasonable and excessive in nature, as they bill for more than twenty-four hours in a single day. Moreover, Plaintiff argues, Defendant fails to identify the person performing the service. In reply, Defendant identifies each person by name; and, with respect to the greater than twenty-four hours issue, Defendant states that its billing program enters the entire month's billing for law clerks on the last day of the month. Hence, the possibility of a greater than twenty-four hour entry. The Court finds Defendant's proffered explanations reasonable. Additionally, Defendant addressed each of Plaintiff's objections to Defendant's

itemized billing statement. The Court has reviewed Defendant's responses to Plaintiff's objections, and finds that Defendant has satisfied LRCiv. 54.2.

Plaintiff also argues that under LRCiv. 54.2, travel time cannot be charged, and yet Defendant includes an entry for a March 30, 2009, travel. In reply, Defendant omits this charge from its request for attorneys' fees.

Plaintiff next argues that Defendant failed to provide a fee agreement for Mr. Krob, and the retention agreement for Mr. McCoy. In reply, Defendant avers that there is no written agreement between itself and Mr. Krob. Defendant does, however, attach as an exhibit a declaration explaining his hourly rates, as well as those of his employees. Defendant also included a copy of the retention agreement between Defendant and Mr. McCoy. The Court finds that Defendant has complied with LRCiv. 54.2 and has provided the Court with sufficient documentation concerning its fee agreements.

The Court has reviewed the factors contained in LRCiv. 54.2(c)(3) concerning the reasonableness of Defendant's requested award. In particular, the court finds LRCiv. 54.2(c)(3)(A),(B),(C),(E),(H),(I), and (K) supportive of Defendant's requested award. Additionally, the Court has considered the number of hours reasonably expended by Mr. Krob and Mr. McCoy, and the propriety of the hourly rate requested by each; whether Mr. Krob and Mr. McCoy have made a good faith effort to exclude hours that are excessive, redundant, or otherwise unnecessary; and the level of success obtained through Mr. Krob's and Mr. McCoy's efforts. The Court finds that Defendant's requested award of $139,920 to be reasonable and supported by the above factors.[3]

III. Defendant's Motions to Amend Judgment and Plaintiff's Motion to Strike

A. Defendant's Motion to Amend at Doc. # 39

On October 22, 2009, the Court entered an Order resolving the cross-motions for summary judgment in favor of Defendant. That same day, the Clerk of the Court entered the

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[3] Defendant intimates that it will move for attorneys fees incurred in pursuing its attorneys' fees motion. Defendant shall file a new motion in compliance with the local rules requesting such attorneys' fees.

following judgment: "IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed October 22, 2009, granting Defendant's Motion for Summary Judgment, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and complaint and action are dismissed." (Doc. # 34.) The Court affirmed the arbitration award in full, yet nevertheless the Court did not mention a specific dollar figure in directing the Clerk of the Court to enter judgment, nor did the Court direct the Clerk of the Court to specifically identify the arbitration award in the judgment.

On November 5, 2009, Defendant moved pursuant to Rule 59(e) to have the judgment amended so as to provide clarity to the parties. Plaintiff did not substantively oppose the need to amend the judgment.[4] The Court agrees that, for the purpose of providing clarity, the October 22, 2009, judgment should be amended. As such, the Court has included the proper language at the end of this Order.[5]

B. Plaintiff's Motion to Strike

On November 12, 2009, at Doc. # 42, Defendant filed an amendment to its proposed form of judgment. After an administrative notice concerning the deficiency of Defendant's filing at Doc. # 42, Defendant filed at Doc. # 44 the same amended proposed form of judgment, only in the form of an amended motion to amend the judgment. Plaintiff now seeks to strike the documents contained at Doc. #'s 42 and 44 pursuant to LRCiv. 7.2(m)(1)

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[4] Plaintiff states that it does not oppose Defendant's request to amend the judgment at Doc. # 39 *if* the Court grants Plaintiff's requested relief at Doc. # 40. The Court does not condone Plaintiff's puerile notion that it is acceptable to agree to relief that is needed for purposes of clarity only if Plaintiff obtains its unrelated, requested relief. Either Defendant's requested relief at Doc. # 39 has a valid legal basis or it does not; Plaintiff proposes no substantive basis for opposing Defendant's requested relief at Doc. # 39. As such, it is unclear why Plaintiff would suddenly oppose Defendant's motion at Doc. # 39 should the Court deny Plaintiff's requested relief at Doc. # 40. Plaintiff's counsel is reminded of that wisdom of old: "Simply let your 'Yes' be 'Yes,' and your 'No,' 'No.'"

[5] The Court expressly notes that the amended judgment works no substantive changes to the Court's October 22, 2009, Order. Rather, the judgment is amended only for the purpose of more clearly expressing the intentions of the Court in its October 22 Order; namely, to fully affirm the arbitrator's award, including the monetary award.

on the basis that Defendant was not authorized under any statute, rule, or court order to file these documents.

LRCiv. 7.2(m)(1) provides that "a motion to strike may be filed . . . if it seeks to strike any part of a filing or submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court order." Defendant filed its initial Rule 59(e) motion on November 5, 2009, within the 10 day time limit for the filing of such motions. Defendant filed the documents contained at Doc. # 42 on November 12, 2009, and the documents contained at Doc. # 44 on November 18, 2009. The Court is not aware of a provision in the Federal Rules of Civil Procedure permitting the filing of an amended Rule 59(e) motion, nor does Defendant so suggest. Likewise, the Court is not aware of a basis that would permit Defendant the ability to amend its Rule 59(e) motion after the 10 day time limit has passed. *See Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993) (stating that district courts are without power to extend the time for filing a Rule 59(e) motion). Accordingly, the Court must conclude that Defendant's filings at Doc. # 42 and 44 are untimely and, as such, the Court strikes the documents contained at Doc. # 42 and 44.

C. Pre-Judgment Interest

In Defendant's original motion to amend the judgment at Doc. # 39, Defendant made no reference to a request for interest in either its motion or in its proposed form of judgment. In Defendant's amended proposed form of judgment contained at Doc. #'s 42 and 44, Defendant has a section devoted to interest. Because the Court has already stricken Doc. #'s 42 and 44, and because Defendant did not include a request for interest in its original motion to amend the judgment at Doc. # 39, the Court finds that these deficiencies are fatal for Defendant's request for pre-judgment interest.

Interest that accumulates from the time an arbitration award is issued until the time a judgment from the district court affirming the arbitration award is entered is considered pre-judgment interest. *See Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1155-56 (9th Cir. 1988) (distinguishing in arbitration context between pre-judgment interest and post-judgment interest, and holding that "the effective date of judgment for the purpose of

calculating interest is the date of the district court's order"). A request for pre-judgment interest must be raised in a Rule 59(e) motion. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76, 176 n. 3 (1989); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1130-34 (9th Cir. 2004) (applying the rule pronounced in *Osterneck* concerning Rule 59(e) and a post-judgment motion for pre-judgment interest). In this case, Defendant did not include a request for, much less a reference to, pre-judgment interest in its Rule 59(e) motion at Doc. # 39. As such, the Court is precluded from awarding pre-judgment interest on the arbitration award.

D. Post-Judgment Interest

Defendant argues that "[t]here is no need to distinguish between post-arbitration, pre-confirmation interest and post-confirmation interest," as the Arizona statutory rate, and not the federal statutory rate, applies even in the context of post-judgment interest. (Doc. # 54 at p. 5.) Ninth Circuit case law requires otherwise.

In *Northrop*, the Ninth Circuit, in a case involving the confirmation of an arbitration award, held that while pre-judgment interest is to be calculated according to the applicable state-law rate, post-judgment interest is to be calculated according to federal law. 842 F.2d at 1155-56. Specifically, post-judgment interest is calculated according to the method mandated by Congress in 28 U.S.C. § 1961. As such, the Court will award post-judgment interest according to Section 1961, and not the Arizona statutory rate.[6]

IV. Plaintiff's Rule 59(e), 60(b), and 15(d) Motions

Plaintiff seeks leave to supplement its complaint under Rule 15(d) either pursuant to a Rule 59(e) motion or a Rule 60(b) motion. The basis for Plaintiff's motions is item five in the arbitrator's award: "The Arbitrator orders TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor." (Doc. # 1-2 at p. 40.) Plaintiff asserts that the parties have

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[6] Plaintiff repeatedly asserts in its reply that the post-judgment interest rate issue is moot because there is no money judgment in this case. The Court disagrees. While there is not a specific dollar figure in the Clerk of the Court's judgment, nor in the Court's October 22 Order, the Court fully affirmed the arbitrator's decision, including the monetary award.

fundamentally different interpretations of the 1-800 number issue. Plaintiff believes it can fulfill its obligation under the award by providing Defendant with a new 1-800 number. Defendant disagrees, stating that the award requires Plaintiff to give Defendant control over the 1-800 numbers that Defendant's clients are currently using.

Plaintiff concedes in its motion that once a judgment has been entered, the filing of an amended complaint or a supplemental complaint is not permitted unless the judgment is set aside or vacated under Rules 59 or 60. Hence, the Court will first consider the propriety of granting Rule 59 or 60 relief.

A. Rule 59(e)

District courts have considerable discretion when considering a motion to amend a judgment under Rule 59(e). There are four basis upon which this Court can grant a Rule 59(e) motion: "1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the moving party presents newly discovered or previously unavailable evidence; 3) the motion is necessary to prevent manifest injustice; or 4) there is an intervening change in controlling law." *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (italics and quotations omitted). Plaintiff asserts that it is entitled to Rule 59(e) relief because of newly discovered evidence, and because such relief is necessary to prevent manifest injustice.

1. NEWLY DISCOVERED EVIDENCE

Plaintiff asserts that the newly discovered evidence–namely, the disagreement between the parties concerning the meaning of the award of the 1-800 number–did not come to light until October 2009. The Court disagrees. The arbitrator issued his award in January 2009. It is clear from the face of the award what the arbitrator ordered: that Plaintiff turn over control of the numbers that connect Defendant's customers to a processor. Plaintiff focuses on the word *the*, but misses the thrust of the arbitrator's finding and conclusion; namely, that Defendant is to be awarded control over its merchants in the event Defendant decides not to retain Plaintiff's services. It was not the goal of the arbitrator, as mentioned throughout his award, to award Defendant a single telephone number; rather, Defendant was

seeking ownership and control of the numbers its merchants use. Defendant articulated this same understanding as early as February 2009 in a letter from Mr. Maley.

Plaintiff may disagree with the award issued by the arbitrator, but attaching a new interpretation to the award hardly constitutes new evidence within the meaning of a Rule 59(e) motion. At most, the parties have discovered a new disagreement, but not new evidence within the meaning of a Rule 59(e) motion. Moreover, the Court fails to see why this issue was not raised with Plaintiff's original filing in January 2009; or at the very least, upon receiving Defendant's February 2009 letter. The Court finds that Plaintiff failed to present newly discovered or previously unavailable evidence such that Rule 59(e) relief is appropriate.

2. MANIFEST INJUSTICE

Plaintiff argues that not granting it leave to file a supplemental complaint would work a manifest injustice, as the three numbers that Defendant's merchants use to connect to a processor are also used by other merchants besides Defendant's customers. Hence, Plaintiff asserts, by turning control of these three numbers over to Defendant, Plaintiff would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise. Again, it is not clear why these arguments and evidence in support were not raised both before the arbitrator and in Plaintiff's initial complaint to this Court. In essence, Plaintiff asks the Court to reconsider and re-weigh–should the Court allow a Rule 15 amendment–the consequences of the arbitrator's award concerning the 1-800 number issue. "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2617 n.5 (2008) (quoting 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1, pp. 127-28 (2d ed.1995)). Even if Plaintiff is subjected to substantial costs, breach of contract claims, and potential security threats as it asserts, such results are the natural consequences of the arbitrator's award. In the arbitration context, the Court cannot grant the type of relief Plaintiff is ultimately seeking merely because the award will work a hardship

for Plaintiff. Plaintiff's complaints resulting from the arbitration award do not constitute manifest injustice within the meaning of Rule 59(e).[7]

Because Plaintiff has failed to show manifest injustice or present newly discovered evidence, Plaintiff's request for Rule 59(e) relief is denied.

B. Rule 60(b)

Plaintiff also seeks relief under Rule 60(b)(6). Rule 60(b)(6) provides that relief from a final judgment may be granted for any reason "that justifies relief" other than those listed under Rule 60(b)(1)-(5). Rule 60(b)(6) is thus a catch-all provision that "has been used sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). To prevail under Rule 60(b)(6), the moving party "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)).

As discussed earlier, Plaintiff has failed to demonstrate why the 1-800 issue was not raised either before the arbitrator or in Plaintiff's initial filing in this Court. Both the testimony before the arbitrator and the award itself make clear that the 1-800 issue was fully litigated at the time of arbitration. Plaintiff has failed to demonstrate that its injuries are beyond its control such that it was precluded from raising these issues prior to the present motion. Moreover, as discussed earlier, the Court does not believe that manifest injustice will result should the Court not permit Plaintiff the ability to supplement its complaint. The Court denies Plaintiff's requested Rule 60(b)(6) relief.

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[7] At oral argument, the prospect of Plaintiff filing a new and separate declaratory judgment action concerning the 1-800 issue was raised. The Court makes no comment concerning the propriety of such a course of action.

Therefore, because the Court has denied Plaintiff's request to amend the judgment under either Rule 59(e) or 60(b)(6), the Court denies Plaintiff's request to supplement its complaint.

V. Conclusion

The Court grants Defendant's request for an award of attorneys fees in the amount of $139,920. The Court also grants Defendant's motion at Doc. # 39 to amend the judgment. The Court grants Plaintiff's motion to strike Doc. #'s 42 and 44 on the ground that they are untimely. The Court further denies Defendant's request for pre-judgment interest. Finally, the Court denies Plaintiff's request to amend the judgment and file a supplemental pleading.

Accordingly,

IT IS ORDERED that Defendant Electronic Payment Systems, LLC's Motion for Attorneys' Fees and Related Non-Taxable Expenses (Doc. # 35) is granted.

IT IS FURTHER ORDERED that Defendant's Motion to Amend Judgment (Doc. # 39) is granted to the extent discussed above.

IT IS FURTHER ORDERED that Plaintiff TSYS Acquiring Solution, LLC's Combined Motion to Amend or Vacate Judgment Under Rules 59(e) and 60(b) and Motion for Leave to File a Supplemental Pleading Under Rule 15(d) (Doc. # 40) is denied.

IT IS FURTHER ORDERED that Defendant's Motion for Judgment (Doc. # 42) and Defendant's Amended Motion to Amend Judgment (Doc. # 44) are both stricken.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Document Numbers 42 and 44 (Doc. # 46) is granted to the extent it is premised upon untimeliness.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter an amended final judgment as follows:

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed October 22, 2009 (Doc. # 33), granting Defendant's Motion for Summary Judgment, judgment is entered in favor of Defendant and against Plaintiff. The Arbitrator's Findings, Conclusions and Award dated January 20, 2009, in American Arbitration Association Case No. 76-Y-000038-07, is hereby confirmed, awarding the following amounts and relief to

Defendant Electronic Payment Systems, LLC, and against Plaintiff TSYS Acquiring Solutions, LLC:

1. Refunds of amounts over-billed by TSYS and paid by EPS
   a. Transaction fees
      $24,465.16
   b. Help Desk Services
      $32,436.20
   c. Monthly Merchant Statement file fees
      $42,884.75
      $32,062.91
      $4,767.00
2. Reimbursement of fines and charges paid by EPS
   a. VMPD
      $131,875.00
   b. Papa Gyros Interchange
      $17,607.74
3. $2,671,463.57 for damages to EPS for its counter-claims in connection with the Billing Element Tables.
4. TSYS shall handle all future calls from EPS merchants as specified in the arbitrator's award and TSYS shall modify the charges on all invoices as reflected in the arbitrator's award.
5. TSYS shall provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor.
6. $27,241.49, representing the costs incurred by EPS in connection with the arbitration.
7. The administrative fees and expenses of the American Arbitration Association totaling $16,750.00 shall be borne entirely by TSYS. Therefore, TSYS shall reimburse EPS the additional sum of Thirty Eight Thousand Six Hundred Fifty Dollars and No Cents ($38,650.00) representing that portion of said fees and expenses

in excess of the apportioned costs previously incurred by EPS, upon demonstration that these incurred costs have been paid.

8. The arbitrator found that TSYS failed to establish that it is entitled to be paid the fees billed for the XML Statement file in the amount of $2,250 per month. From April 2006 through June 2008, such charges amount to $60,750. Consistent with the arbitrator's ruling, TSYS shall not charge EPS for the XML Statement file from June 2006 forward.

9. Based on the calculations set forth on Exhibit R-31 before the arbitrator, the arbitrator found and concluded that TSYS over-billed EPS for the CDs between December 2006 and June 2008 in the amount of $30,595.10 and sustained EPS' dispute in that same amount.

PRINCIPAL AMOUNT AWARDED: $3,114,798.92

Attorneys fees: $139,920.

TOTAL AMOUNT AWARDED THROUGH DATE OF JUDGMENT, OCTOBER 22, 2009: $3,254,718.92

Interest: post-judgment interest shall accrue at the applicable federal rate.

Plaintiff to take nothing, and complaint and action are dismissed.

DATED this 4th day of May, 2010.

James A. Teilborg
United States District Judge